

NEW HAMPSHIRE LAW LIBRARY

June 16, 1955.

SEP 22 1998

CONCORD, N.H.

Honorable Frederic H. Fletcher
Governor's Councillor
Milford, New Hampshire

Dear Councillor Fletcher:

You have asked for clarification of the statement in my report to the Governor and Council, June 15, 1955 " . . . it is not within this office's power or your power to rule that they (the commission) acted upon inadequate evidence or failed to exercise honest judgment" and my opinion that the Governor and Council are without power to reconstitute the commission with instructions to re-assess damages to properties of landowners on the Exeter-Stratham highway who claim to be aggrieved by the awards of the commission.

The question goes to the fundamental separation of legislative, executive and judicial powers in our American system of government. The laying out of highways partakes of the character of judicial proceedings. State v. Richmond, 26 N. H. 232. This is so because a commission in the case of state roads (and selectmen in the case of town roads) are actually exercising a delegated function of the court by virtue of legislative enactment granting that authority delegation. State highways were formerly laid out by the Court of Common Pleas. State v. Town of Rye, 35 N. H. 368. The laying out of a highway by commissioners having jurisdiction of the subject matter is a judgment which cannot be collaterally attacked. Dana v. Craddock, 66 N. H. 593; State v. Town of Canterbury, 28 N. H. 195; Spaulding v. Town of Groton, 68 N. H. 77; Bryant v. Timworth, 63 N. H. 433.

Just as the courts have no jurisdiction to alter or review administrative decisions where no specific authority to do so is provided, (Ham v. Maine-New Hampshire Interstate Bridge Authority, 92 N. H. 268; Petition of N. H. Gas and Electric Co., 88 N. H. 50; Sinkavitch v. Nashua Police Commission, 97 N. H. 262; Richardson v. Beattie, 98 N. H. 71; H. J. Hood and Sons, Inc. v. Boucher, 98 N. H. 399.) the Governor and Council have only the limited power of judicial review provided by Revised Laws, chapter 90, Part 4, section 17-a, as inserted by Laws of 1954, section 1 and, having already exercised that limited delegated power, cannot assume the function of the judiciary branch of government to

Honorable Frederic H. Fleischman

June 16, 1955.

compel general review of the amount of the commission's award. Carpenter's Petition, 67 N. H. 574; Bennett v. Tuftonborough, 72 N. H. 63; Opinion of the Justices, 98 N. H. 533. To rule otherwise would do violence to our fundamental concept of government.

There is a complete new assessment of damages on appeal. The appeal furnishes an adequate remedy. Bickford v. Town of Franconia, 73 N. H. 194.

Very truly yours,

George F. Nelson
Assistant Attorney General

GFN:L